BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

ALAN D. ASHCRAFT	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,060,523
THE SHEPHERD'S CENTER, INC.	)	
Respondent	)	
AND	)	
	)	
KANSAS ASSN. OF HOMES FOR THE AGING INS.	)	
Insurance Carrier	)	

ORDER

Respondent requests review of the December 17, 2012, preliminary hearing Order entered by Administrative Law Judge (ALJ) Pamela J. Fuller.

APPEARANCES

Bruce A. Brumley, of Topeka, Kansas, appeared for the claimant. D. Shane Bangerter, of Dodge City, Kansas, appeared for respondent and its insurance carrier.

RECORD AND STIPULATIONS

The Board has adopted the stipulations and considered the same record as did the ALJ, including the transcript of the deposition of Edward J. Prostic, M.D., dated October 1, 2012, with attached exhibits, and the transcript of the of preliminary hearing dated December 12, 2012, with attached exhibits, and the documents filed of record with the Division.

ISSUES

The ALJ found claimant's myocardial infarction and related complications were a natural and probable consequence of the treatment received for claimant's work-related back injury. Respondent was found responsible for the payment of related medical bills.

The respondent requests review of the compensability of claimant's post surgery heart attack and the Order making respondent and its insurance company responsible for the medical bills incurred as the result of that heart attack and related medical complications. Respondent contends the "Heart Amendment" contained in K.S.A. 44-501(c) does not apply to this situation as claimant was not working at the time of the heart attack. Additionally, respondent contends the heart condition developed as the result of claimant's medical history and lifestyle and was not the result of the work-related injury and subsequent surgery.

Claimant argues the ALJ's Order should be affirmed, arguing that the heart attack was triggered by the authorized back surgery and therefore, compensable.

FINDINGS OF FACT

After reviewing the record compiled to date, the undersigned Board Member concludes the preliminary hearing Order should be affirmed.

Claimant worked for respondent in a nursing home in Cimarron, Kansas. On December 30, 2010, while caring for a resident at respondent's facility, claimant suffered a work-related injury to his low back. This injury is not disputed by respondent. An MRI displayed a right posterolateral disc extrusion at L2-3 and bilateral spondylolysis with grade 1 spondylolisthesis at L5-S1. On September 21, 2011, claimant underwent back surgery to repair the injuries to his lumbar spine. On September 22, 2011, the day after the surgery, claimant suffered a myocardial infarction (MI). He underwent an emergency coronary artery bypass and later developed post-operative hypotension, worsening renal function, atrial fibrillation and persistent pulmonary edema. He was also diagnosed with kidney failure, pneumonia and respiratory failure. Claimant remained hospitalized until November 7, 2011, after which he was transferred to a rehabilitation facility. His medical bills have exceeded $800,000.

Respondent does not contest the medical treatment generated by the low back injury and surgery. Respondent contends any treatment related to the heart attack and subsequent medical complications is not related to the low back injury. Claimant argues the heart attack and multitude of medical complications were triggered by or caused by the stress of the surgery.

Claimant was referred by his attorney to board certified orthopedic surgeon Edward J. Prostic, M.D., on July 9, 2012. Dr. Prostic also had the opportunity to review the medical records from the University of Kansas Hospital and KU Orthopedic and Sports Medicine. All told, Dr. Prostic reviewed over 340 pages of medical reports. Dr. Prostic diagnosed claimant with a total laminectomy at L5 with arthrodesis at L5-S1 to pedicle screws and rods. After the back surgery, claimant suffered acute heart failure leading to surgery and a multitude of complications. Dr. Prostic opined that the acute heart failure and the complications that flowed from the MI were due to the treatment for the work

related accident. He also determined that the medical bills were reasonable and necessary for the type of treatment claimant received.

However, on cross examination, Dr. Prostic admitted he was unaware of claimant's smoking history and was unqualified to determine the effect a two pack a day smoking habit would have on claimant's coronary artery disease. He admitted a preexisting coronary artery disease question would not be in his area of expertise. He also had no information regarding possible preexisting angina or low HDL levels, recommending those questions be presented to a cardiologist.

Respondent provided claimant's medical information to board certified cardiologist Michael W. Farrar, M.D. Dr. Farrar was aware of claimant's prior hypertension and his 44 year history of smoking two packs of cigarettes daily. A preoperative ECG showed an ectopic atrial bradycardia, which was described as a normal variant. On the day following the back surgery, claimant initially presented with no chest pain and his cardiac enzymes were negative with a normal ECG. Again the ECG changes were considered secondary to hypertension. However, later that night, close to midnight, claimant developed chest discomfort with pain radiating to his left side. He had marked shortness of breath, nausea and vomiting. He was in pulmonary edema, hypotensive and tachycardic. Claimant underwent a cardiac catheterization which revealed severe left main and multivessel coronary artery disease with multiple high-grade stenosis in the left anterior descending and dominant coronary arteries. Claimant later underwent a coronary artery bypass and mitral valve repair.

Dr. Farrar determined claimant had long-standing, very severe, preexisting, unstable coronary artery disease prior to his back surgery. He opined claimant was having angina prior to the surgery, identified by the indigestion-like discomfort claimant had experienced. In his opinion, the coronary artery disease was caused by claimant's inadequately treated hypertension, low HDL levels, an apparent family history of heart disease and long term and heavy cigarette smoking, which Dr. Farrar opined increased claimant's risk of a myocardial infarction by over 900 percent. Claimant's coronary condition put him at a very high risk of experiencing an MI or sudden cardiac death. Dr. Farrar acknowledged claimant's MI could have been triggered by any number of ordinary activities of daily living, including lifting, other work, sexual activity, emotional distress, exposure to traffic and air pollution. However, he went on to say the back surgery acted as a "trigger to uncover his condition".[1] Dr. Farrar even went so far as to say having this MI happen in the hospital probably saved claimant's life as another trigger in a non-hospital setting would have probably resulted in claimant's death.

[1] P.H. Trans., Cl. Ex. 1 at 2.

PRINCIPLES OF LAW AND ANALYSIS

In workers compensation litigation, it is the claimant's burden to prove his or her entitlement to benefits by a preponderance of the credible evidence.[2]

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.[3]

K.S.A. 2010 Supp. 44-501(e) states:

> Compensation shall not be paid in case of coronary or coronary artery disease or cerebrovascular injury unless it is shown that the exertion of the work necessary to precipitate the disability was more that the employee's usual work in the course of the employee's regular employment.

The parties disagree over the involvement of the "Heart Amendment" to this factual situation. Respondent contends the statute was created to protect employers from becoming absolute insurers of claimants whose death or disability was merely the result of the natural progress of heart disease which coincidentally occurred in the workplace or in the course of employment. Claimant contends the amendment has no application because claimant's heart attack occurred, not as the result of or during work, but during authorized medical treatment. Respondent, in its brief, cites K.S.A. 44-501(c), while claimant cites K.S.A. 44-501(e). Both quote identical wording of the legislative language. However, respondent's citation is from the May 15, 2011, version of the Kansas Workers Compensation Act (Act). Claimant's citation is from the pre-May 15, 2011, legislative version of the statute. With claimant's date of accident being December 30, 2010, the pre-May 15, 2011, version is appropriate.

Respondent cites *Bergstrom*[4] for the proposition that:

> When a workers compensation statute is plain and unambiguous, the courts must give effect to its express language rather than determine what the law should or should not be. The court will not speculate on legislative intent and will not read the statute to add something not readily found in it. If the statutory language is clear, there is no need to resort to statutory construction."[5]

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[2] K.S.A. 2010 Supp. 44-501 and K.S.A. 2010 Supp. 44-508(g).

[3] *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

[4] *Bergstrom v. Spears Manufacturing Company*, 289 Kan. 605, 214 P.3d 676 (2009).

[5] *Id.*, Syl. ¶ 1.

Respondent is correct in its reading of *Bergstrom*. However, that case does not benefit respondent's position on this issue. K.S.A. 44-501(e) is very specific in its language. For the statute to apply, the coronary must stem from the exertion of the work, more than the employee's usual work in the course of the employee's regular employment. This language clearly contemplates a coronary event during or arising out of the labors of work. That is not the case here. This claimant suffered an MI shortly after undergoing surgery for a work related event. But that MI did not arise from the exertions of or during work. As noted by the Supreme Court in *Mudd*[6], the heart amendment applies to those cases where the exertion of claimant's work is the agency necessary to precipitate the disability.[7] This Board Member finds the heart amendment does not apply to this situation.

The next issue deals with the natural and probable consequence of claimant's back injury. When a primary injury under the Workers Compensation Act arises out of and in the course of a worker's employment, every natural consequence that flows from that injury is compensable if it is a direct and natural result of the primary injury.[8]

Injury or death which is caused by the medical treatment for a compensable injury is considered a direct and natural result of the primary injury and is compensable. It matters not whether the medical treatment is skilled authorized treatment[9] or medical malpractice.[10]

This leads to the issue of whether claimant's MI stemmed from the medical treatment to his low back and, thus, a natural and probable consequence of the back injury, or was the result of claimant's prior health problems and long term smoking habits. Here claimant underwent authorized medical treatment, including surgery, at the KU Medical Center. The next day he suffered the MI and a host of medical complications which followed.

Two medical experts addressed the cause of the MI and the need for the heart surgery and extensive medical treatment. Dr. Prostic found the acute heart failure and the complications that flowed from that were due to the treatment for the work-related accident. However, Dr. Prostic's opinion is flawed. He did not have a clear understanding of claimant's preexisting health concerns or his smoking habits. He was unable to express

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[6] *Mudd v. Neosho Memorial Regional Med. Center*, 275 Kan. 187, 62 P.3d 236 (2003).

[7] *Id.*, Syl. ¶ 2.

[8] *Gillig v. Cities Service Gas Co.*, 222 Kan. 369, 564 P.2d 548 (1977).

[9] *Quinones v. MBPXL Corp.* 10 Kan. App. 2d 284, 697 P.2d 891 (1985).

[10] *Roberts v. Krupka*, 246 Kan. 433, 790 P.2d 422 (1990).

an opinion on how claimant's two pack a day, 44 year smoking habit would effect his coronary artery disease.

Dr. Farrar, a qualified cardiologist, determined that claimant's cardiac condition and need for acute cardiac care was not the result of his work, but simply the result of common, well documented cardiac risk factors, independent of claimant's work and employment. Had Dr. Farrar stopped there, the result in this matter would be different. But, he did not stop. Instead, he expressed his opinion that the surgery acted as a trigger to uncover claimant's coronary condition.

In workers compensation litigation, it is not necessary that work activities cause an injury. It is sufficient that the work activities merely aggravate or accelerate a preexisting condition. This can also render the condition compensable.[11]

Claimant had pre-existing heart problems. Those problems were aggravated and accelerated by the back surgery. Thus, under the law in place at the time of claimant's accident, the natural and probable consequence of the low back surgery, i.e. the MI, becomes compensable.

Respondent earlier cited the post-May 15, 2011, version of the Act. Under that more recent law, an injury is deemed to arise out of employment only if the accident "is the prevailing factor causing the injury, medical condition, and resulting disability or impairment."[12] Additionally, the words "arising out of and in the course of employment" under the new Act, would not apply to an injury which arose out of a risk personal to the worker.[13] Had this situation arisen after the enactment of the 2011 version of the Act, respondent would, in all likelihood, have been relieved of the liability of this significant medical expense. That is not the case in this instance.

This Board Member finds the Order of the ALJ, granting claimant's request for the payment of the medical bills, generated by the necessary treatment of claimant's MI and subsequent related medical conditions, by respondent and its insurance company, should be affirmed.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[14] Moreover, this review of a preliminary hearing Order has been determined by only one Board Member,

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[11] *Harris v. Cessna Aircraft Co.*, 9 Kan. App. 2d 334, 678 P.2d 178 (1984).

[12] K.S.A. 2011 Supp. 44-508(f)(2)(B).

[13] K.S.A. 2011 Supp. 44-508(f)(3)(A).

[14] K.S.A. 44-534a.

as permitted by K.S.A. 2011 Supp. 44-551(i)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

CONCLUSIONS

Claimant has proven that the MI and subsequent medical conditions which occurred after claimant's authorized low back surgery were the natural consequence of claimant's low back surgery. The Order requiring respondent and its insurance company to pay for that medical treatment and any related medical bills is affirmed.

DECISION

WHEREFORE, it is the finding, decision and order of the undersigned Board Member that the Order of Administrative Law Judge Pamela J. Fuller dated December 17, 2012, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of March, 2013.

_____
HONORABLE GARY M. KORTE
BOARD MEMBER

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Pamela J. Fuller, Administrative Law Judge